MOTION FILED

NOV 18 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77—576

J. GORDON EDWARDS, Ph.D., THOMAS H. JUKES, Ph.D.,
ROBERT WHITE-STEVENS, Ph.D.,

Petitioners,

v.

NATIONAL AUDUBON SOCIETY, INC.
ROBERT S. ARBIB, JR., ELVIS J. STAHR, JR.,

Defendants,

and

THE NEW YORK TIMES COMPANY,
ROLAND C. CLEMENT,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF AMICUS CURIAE

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To the Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of the Supreme Court, Accuracy in Media, Inc. (AIM) moves for leave to file as amicus curiae the accompanying brief in support of a petition for a writ of certiorari to the Court of Appeals for the Second Circuit filed on October 18, 1977 in the above captioned proceeding.

STATEMENT OF INTEREST AND REASONS FOR GRANTING THE MOTION

Accuracy in Media, Inc. is a non-profit organization dedicated to the public interest in a fair and balanced presentation by the media of the news and objectivity in reporting of issues vital to an informed public. It is supported by public contributions. For over eight years AIM has monitored the daily press as well as broadcasting in an effort to afford constructive criticism of contemporary journalism. AIM maintains no partisan position on critical issues but seeks to encourage ethical and responsible practices on the part of journalists. The organization has accumulated considerable experience as the result of a variety of complaints it has received from the public in relation to grievances against the media. As a public interest group, we seek by this motion the opportunity of supporting the petitioners, since we believe the issues at stake on this appeal are of wide concern to the public at large and to the future of responsible journalism.

We live in an age where the mass media are capable of moulding public opinion to an extent unprecedented in history. It becomes imperative that the immunity of the press under the First Amendment is not construed by irresponsible journalists as a license to distort public issues under the guise of assailing the integrity of the "public figures" who are the protagonists in the market place of ideas. Investigative reporting has a long and honorable tradition in American journalism, but an understanding of contemporary social and political problems is not illuminated by an exclusive pursuit of sensationalism in reporting the news. The complex issues of urban renewal, poverty, civil rights, housing problems and strategic arms limitation, inter alia, require balance, fairness and some depth of understanding on the part of journalists if they are to make clear to the public the merits of proposed solutions to such issues. This is not to denigrate the importance of investigation of corruption on the part of "public officials" but that is a far cry from an irresponsible assault on the character of "public figures" on whom we depend for enlightenment and the civility of intelligent discourse free from the constraints of potential libel.

For, if "public figures" become fearful of engaging in the market place of ideas, then a democratic society will have suffered an irreparable injury. If the constitutional immunity of the press were to be extended beyond the limits of *New York Times v. Sullivan*, as the holding of the Circuit Court of Appeals indicates, the opportunity to abuse the privilege and power of influencing public opinion by the media would receive judicial sanction.

The prayer of petitioners, which we adopt, is set forth in their petition as follows:

Petitioners, Dr. J. Gordon Edwards, Dr. Thomas H. Jukes and Dr. Robert White-Stevens, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing the decision of the United States District Court for the Southern District of New York, granting a judgment in favor of plaintiffs after a jury verdict awarding Dr. Edwards $21,000 against the New York Times and Roland C. Clement for the Times article and $1.00 against Mr. Clement for the August 14, 1972 letter, and awarding Dr. Jukes and Dr. White-Stevens $20,000 each against the Times and Roland Clement for the Times article and $1.00 each as against Mr. Clement for the August 14, 1972 letter, the total thereof being $61,003.00.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 25, 1977. A petition for rehearing with a suggestion for rehearing en banc was filed on June 8, 1977, and denied on July 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit Court of Appeals has expanded the scope of immunity of the press from defamation suits by public figures beyond the intention of *New York Times v. Sullivan?*

2. Whether the First Amendment protects the New York Times from a suit for libel predicated on a concededly unwarranted assault on the reputation of several distinguished scientists despite a jury's finding that the publication was made in reckless disregard of whether it was false or not?

3. Whether the Second Circuit Court of Appeals opinion has virtually written a new version of *New York Times v. Sullivan* by holding that if a journalist "accurately" conveys the charges made by others he is immune from defamation suits unless the publisher expresses or concurs in the charges or launches a personal attack of his own?

4. Whether these newly-developed criteria undermine any possibility, and indeed even the relevance, of demonstrating through circumstantial evidence that the reporter was reckless and/or was aware of the baseless nature of the accusations?

5. Whether the departure from the holding of *New York Times v. Sullivan* will result in the complete emasculation of any possible libel suits in the future by a public figure with the chilling effect of inhibiting any reputable scientist from risking his integrity and reputation by entering into public debate, to the serious detriment of the peoples' right to know?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment, which reads in relevant part:

> Congress shall make no law... abridging the freedom of speech, or of the press...

as made applicable to the States by the Fourteenth Amendment.

STATEMENT OF THE CASE

Although we concur substantially in the statement of the case by petitioners, we believe it important to highlight the salient facts of the proceeding below.

On August 14, 1972, there appeared in the New York Times an article headlined "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count." This article appeared under the by-line of the Times reporter John Devlin. The so-called "spokesmen" for the pesticide industry referred to (and named by Devlin) were in fact five distinguished scientists, including a Nobel prize laureate. Devlin's article in the New York Times opens as follows:

> Pesticide Spokesmen Accused
> Of 'Lying' on Higher Bird Count
> by John Devlin
>
> "Segments of the pesticide industry and certain 'scientist-spokesmen'" are accused in the current issue of American Birds of "lying" by saying that bird life in America is thriving despite the use of DDT.

The malicious nature of Devlin's article is aptly characterized by the Court of Appeals:

> "....the Audubon Society's principal charges, as reported in Devlin's article for the Times, went far beyond a mere accusation of scientific bad faith. The appellees were charged with being "paid to lie". It is difficult to conceive of any epithet better calculated to subject a scholar to the scorn and ridicule of his colleagues than "paid liar". It is this completely foundationless accusation of venality that constitutes the essence of the calumny against the appellees." (17A)*

Furthermore, the Court of Appeals decision stated that: "to call the appellees, all of whom were university professors, *paid* liars clearly involves defamation that far exceeds the bounds of the prior controversy. No allegation could be better calculated to ruin an academic reputation. And, to say a scientist is *paid* to lie implies corruption and not merely a poor opinion of his scientific

*(Citations terminating in "A" refer to page numbers in the Appendix to Petitioners' Brief)

integrity. Such a statement requires a factual basis, and no one contends there was any serious basis for such a statement in this case.". (Footnote 5, 16A)

Nor, indeed, does the Court of Appeals "condone the mischievous and unwarranted assault on the good name of the appellees." As to the respondent Clement, Vice-President of the Audubon Society, the Court indicated that "Clement demonstrated himself quite content to have called the appellees liars. . ." although he never intimated that "they were corrupt." (18A)

One of the more strained conclusions of the Circuit Court of Appeals is that Devlin "'in good faith' elicited both sides of the story to the best of his ability". If so, the results are not apparent in his article, since he studiously refrained from presenting the other side. The article was completely lacking in balance, fairness or objectivity. It is reasonable to exempt factual mistakes by a journalist due to the constraints of a deadline, but to say that any libelous attack on a public figure is "newsworthy" per se (3A) and therefore constitutionally protected regardless of its truth is to put a judicial imprimatur on sensation for the sake of sensation and not for the sake of responsible journalism. To characterize a libel as "newsworthy" is to encourage the practice of libel as a means to achieving a "newsworthy" story, regardless of the consequences. Devlin's highly unreasonable conduct constitutes "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Curtis Publishing Co. v. Butts*, 288 U.S. 130, 155 (1967).

It is the surrounding factual circumstances as found by the Court and jury in the first instance that we wish to outline briefly. In its consideration of the evidence adduced at trial showing actual malice, the Court of Appeals opinion glosses over significant elements of record testimony so as to arbitrarily force the conclusion that Devlin was unaware of the baselessness of the Audubon Society's dramatic allegations. Indeed, the Court engaged in a somewhat dramatic conclusion of its own, i.e., that there was not "a shred of evidence from which the jury might have found that Devlin entertained serious doubts concerning the truth of Arbib's charge that the appellees were 'paid liars'". (15A)

The facts of record show otherwise. The scenario is well portrayed in Petitioners' brief to this Court for a writ of certiorari. Devlin was a reporter of considerable experience "who must have known from the outset that he was dealing with a libelous article." (Finding of Judge Metzner). In search of a hot item (in the otherwise unexciting field of nature reporting) and with a nose trained to smell out potential drama, Devlin sensed an opportunity when he came across the April 1972 issue of American Birds. Normally, ornithologists who engage in the very pleasant occupation of bird watching and act as guardians of bird life are not belligerent people, nor is their occupation amidst pastoral scenery conducive to the passions of ideological controversy. However, the April issue of American Birds reflected a sharpening controversy and rising emotions as to the effect of pesticides on bird life. Specifically, the Foreword to the April 1972 issue of the Audubon Society's publication challenged the conclusion of "segments of the pesticide industry and certain paid 'scientist-spokesmen' that the bird life of North America is thriving and that many species are actually increasing" despite the widespread use of hydrocarbon pesticides. The Foreword to the April issue maintained that such a conclusion is false and misleading, "a distortion of the facts for the most self-serving of reasons." The Foreword concluded that "what we are seeing is the result of *not more birds, but more birders*. Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about."

Arbib, the Editor of the publication, "does not appear to have had any actual basis for the charge" that scientists supporting DDT were paid liars, (6A) and, indeed, no names were mentioned. Arbib testified "that his comment was never intended to portray anyone in particular as a venal prevaricator; rather, it merely expressed his belief that many supporters of DDT use were spokesmen for the pesticide industry." (6A). At this point (July 1972) Arbib's general accusations came to the attention of *Times* reporter Devlin. Devlin decided to investigate. If he could pry loose some names from a guileless officer of the Audubon Society, there was a possibility of converting a petulant editorial observation into a lurid attack on the reputation of

scientists who were allegedly being paid covertly to lie by the pesticide industry. But how to go about it? Devlin knew his way around. He found a willing ally in the ranks of the Audubon Society, i.e., Roland Clement, a zealous prosecutor of those who disagreed with his version of the effect of pesticides on the growth or decline of bird life. Devlin first telephoned Arbib, the author of the Foreword to the Society's publication of April 1972, which contained the statement about scientists "being paid to lie".

Arbib was reluctant to identify any individuals as the people referred to in his article. Devlin thereupon resorted to a clever seduction. Pretending to be concerned about protecting the reputations of eminent persons who might be unjustifiably injured by the Audubon accusations, he persistently urged Arbib to furnish the names of specific individuals. The blandishments of a wily and determined journalist are difficult to resist. Nevertheless, Arbib told Devlin he did not know of anyone in particular whom he could with assurance call a "paid liar." Arbib then turned to Clement and told him of Devlin's request. Clement knew the purpose for which those names would be used in the Times story (Finding of District Court) and thereupon furnished the names to Arbib, who in turn related the names to Devlin with the warning that although these were the names the Foreword had in mind, nevertheless these scientists were not necessarily "paid liars". Indeed, Arbib told Devlin that the factual basis for the Foreword was hearsay information "that somebody was engaging in misinterpretation of the Audubon bird count data". It is quite apparent that Clement saw a unique opportunity to co-opt the New York Times as a vehicle for carrying on his own vendetta against the plaintiffs, and used Arbib as a conduit to the Times when be supplied the names to his colleague.

The remainder of the story is clearly set forth in the opinion of Judge Metzner on the motion for judgment notwithstanding the verdict rendered by the jury in favor of the plaintiffs.

> "Devlin, with the names in hand, contacted Dr. White-Stevens on August 4 and read the Foreword to him. They had a 45-minute telephone conversation which covered the whole range of the agricultural

chemical business. The testimony showed that this plaintiff was an outstanding scholar in the field of biology. Devlin was told that the statements were slanderous and scurrilous and should be checked carefully before being used. Dr. White-Stevens furnished Devlin with the telephone numbers of the other four named by Arbib although Devlin already knew that Dr. Borlaug was a Nobel Prize winner and associated with Rockefeller University, a most prestigious research institution here in New York City. This plantiff also furnished Devlin with the telephone numbers of other eminent scientists in the field of pest control who should be contacted for their views on the subject. Devlin offered Dr. White-Stevens the opportunity to publish a story on the Op-Ed page of the Times, or even write an article for the Sunday Magazine section, but this offer was never followed up by Devlin.

"Finally, Dr. White-Stevens recapitulated this conversation in a letter to Devlin on August 8 in which he furnished a list of materials for Devlin to read.

"Devlin next called Dr. Jukes on August 7. The testimony of Dr. Jukes showed that he is an eminent scientist in the area of biochemistry and regarded as an international authority on poultry nutrition. He organized the first chapter of the Sierra Club outside the state of California. Devlin told Dr. Jukes that he was working on an article predicated on information given to him by the Society to the effect that Dr. Jukes was a paid liar on behalf of the chemical industry. Dr. Jukes explained to Devlin his method of evaluating bird counts and referred to a letter written by the president of the Hawk Mountain Association. This conversation was followed up by Dr. Jukes in a letter sent to Devlin the same day.

"Devlin also spoke on the telephone to Dr. Spencer who was not a party to this action, nor did he

testify as a witness. However, Devlin's notes show that he wrote "WOW" next to the notation that Spencer called the statements in the Foreword libelous. Devlin testified on trial, "These are newsmaking names. The charges are very dramatic and newsy."

"We thus have an initial publication which was not actionable in the absence of names. The reporter pushes for disclosure of the names so that he might write a story, in a newspaper with over 900,000 daily circulation, about individuals who have been called liars in one of the Society's publications. He knows from the inception that one of the scientists being called a liar is a Nobel Prize winner. He finds out as early as ten days before publication that at least two of the plaintiffs are not in the employ of the pesticide industry, nor are they being paid by such manufacturers to lie. He is given extensive background material on the views of these persons. He is furnished with names of other scientists with whom he might check out the story. He never made any effort to consult with counsel for the *Times* as to possible liability if the story were published. There is no evidence that any of his superiors made such inquiry.

"Ten days were devoted to putting this story in shape with three different drafts of summaries sent by Devlin to his superiors for approval. Despite the warnings and the information furnished the reporter, the story appears in the newspaper as though it had been written the day after the Foreword first appeared in print and no investigation had ever been made. Dr. White-Stevens testified that after a week, he stopped reading the *Times* for any story as to the Foreword. He assumed that Devlin had checked out what he had told Devlin and that Devlin was satisfied that the story was not warranted. Great was this plaintiff's surprise when a student brought the story to his attention. He read it and found that Devlin had ignored everything he told him in the lengthy telephone conversation and in his letter to Devlin."

Judge Metzner concluded that "the jury was justified in finding clear and convincing proof from the evidence and the inferences to be drawn therefrom that the story of August 14 was published with reckless disregard of whether it was false or not." (27A-28A)

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION HAS MISCONSTRUED AND EXPANDED BEYOND ITS INTENTION THE HOLDING OF THIS COURT IN NEW YORK TIMES V. SULLIVAN AND CONSTITUTES A DRASTIC DEPARTURE FROM THE RATIONALE OF THAT CASE. THE COURT OF APPEALS DECISION BROADENS THE SCOPE OF IMMUNITY OF THE PRESS FROM DEFAMATION SUITS BY PUBLIC FIGURES TO THE POINT WHERE A SHOWING OF RECKLESS DISREGARD OF THE FALSITY OF THE LIBEL IS NO LONGER AVAILABLE TO PLAINTIFFS WHOSE REPUTATIONS HAVE BEEN DESTROYED.

Part II of the Circuit Court's opinion contains the essence of its view of the holding in *New York Times v. Sullivan* as applied to a review of the jury's verdict in the trial court. The opinion (in Part II) states as a major premise that a libel judgment against the Times is constitutionally impermissible in the face of a finding of fact that the Times "accurately reported the names of the five scientists as the "paid liars" referred to in the publication of the Audubon Society. In short, the press is immunized from a reckless libel so long as the original charges of the Audubon Society ("being paid to lie") were "accurately" reported and the individuals libeled correctly named. Leaving aside the question of whether the New York Times story which accused the plaintiffs of being "paid liars" was a mere repetition *in haec verba* within the meaning of the Court's decision, we submit that replicating libelous language does not confer automatic

immunity when the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. It is a clear misconstruction of this Court's opinion in *New York Times v. Sullivan* to maintain that the First Amendment "protects the accurate and disinterested reporting" of libelous charges "regardless of the reporter's private views regarding their validity." For it is precisely the reporter's views of validity which make the difference between whether the statement was made with knowledge that it was false (i.e. reckless disregard of falsity), or, on the other hand, whether it was mere repetition without persuasive evidence to indicate that the reporter did indeed have doubts as to its truth and nevertheless proceeded recklessly. The original accusation in the Foreword was like inert dynamite—harmless if handled with care—but if some reckless person came along with a lighted match and decided he would like to set off an explosion, no matter whether innocent persons get hurt, then we have the instant case. In *St. Amant v. Thompson,* 390 U.S. 727, 732 (1968), this Court held:

> "The defendant in a defamation action. . . cannot automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. . . Likewise, reckless disregard may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports".

In short, the Circuit Court opinion holds that the identification and disclosure in a headline in the New York Times captioned "Pesticide Spokesmen Accused of Lying. . ." is protected by the so-called "accurate reporting" of those charges. This conclusion, if sustained, would make it virtually impossible for any plaintiff to offer evidence that a New York Times statement was made with reckless disregard of its falsity. Further inquiry as to whether the reporter had serious doubts about the truth of the statement would be foreclosed *ab initio*. In fact, what was *potentially* libelous in the Audubon Foreword was exploded into a full-fledged libel by the New York Times, and this libel is now immunized by an unwarranted expansion of *New York Times v. Sullivan*.

The instant case is typical of the passions which flow on both sides of ecology and other contemporary issues. The protagonists on either side are generally scientists, physicists, chemists, environmental specialists, and, as public figures, they are fair game for character assassination under the Court of Appeals ruling herein, since recklessness on the part of journalists is virtually eliminated as a criterion of liability for libel. The consequences are enormous for the future of American journalism in terms of insuring a responsible press. A newspaper is now permitted to launch an irresponsible attack on one side or the other of a controversial public issue via the devious road of maligning an outstanding protagonist with impunity. Judge Kaufman has rewritten the *New York Times v. Sullivan* case to hold that so long as a publisher engages in "neutral reportage", he is immune to responsibility for libelous statements unless the plaintiff can show (1) that he (the publisher) in fact espouses or concurs in the charges, or (2) that he deliberately distorts these statements to launch a personal attack. (Slip Op. p. 3770). We submit that these qualifications were never contemplated by *New York Times v. Sullivan*. For by "neutral reportage" Judge Kaufman means "accurate reporting of the charges" and "accurate reporting" *alone*, according to this opinion, serves to throw a cloak of immunity around libel against public figures without the opportunity for demonstrating recklessness on the part of the defendant. The criteria for liability for defamation newly developed by the Circuit Court are clearly beyond the scope of the *New York Times v. Sullivan* holding, which is designed "to insure the ascertainment and publication of the truth about public affairs," *St. Amant v. Thompson, supra* at 731.

This Court has held that in order for it to be found that a defendant, within the meaning of the *New York Times* case, acted in reckless disregard of whether a defamatory statement which he made about a public official is false or not, there must be sufficient evidence to permit the conclusion that the defendant had serious doubts as to the truth of his publication" *St. Amant v. Thompson, supra* at 731. If the state of mind of the journalist is irrelevant, or cannot be demonstrated by circumstantial evidence

as the opinion of the Circuit Court holds, then it becomes impossible to demonstrate that the defendant entertained serious doubts as to the truth of the accusation, or that the publisher acted with a "high degree of awareness of. . . probable falsity," *Id.*

II. THE RATIONALE OF *NEW YORK TIMES v. SULLIVAN* WHICH RESTS ON (1) THE PUBLIC'S RIGHT TO KNOW; (2) THE NEED TO INSURE VIGOROUS ADVOCACY OF PUBLIC ISSUES; (3) THE NEED TO INSURE UNINHIBITED AND VIGOROUS CRITICISM OF THE CONDUCT OF PUBLIC OFFICIALS IN A DEMOCRATIC SOCIETY; (4) AND THE OVERRIDING NEED TO INSURE THE PUBLICATION OF TRUTH ABOUT PUBLIC AFFAIRS HAS BEEN UNDERMINED BY THE CIRCUIT COURT OF APPEALS DECISION HEREIN. IF THIS DECISION IS NOT REVERSED THEN FREEDOM OF EXPRESSION AND ROBUST DEBATE ON PUBLIC AFFAIRS IS SERIOUSLY JEOPARDISED.

New York Times v. Sullivan involved a libel action brought by a public official against critics of his official conduct. This Court held that to allow the plaintiff, the Chief of Police of Montgomery, Alabama to prevail, absent a showing of malice would "shackle the First Amendment in its attempt to insure the widest possible dissemination of information from diverse and antagonistic sources," *New york Times v. Sullivan, supra* at 266, citing *Associated Press v. United States* 326 U.S. 1, 20 (1944) . As Mr. Justice Fortas pointed out in his dissent in *St. Amant v. Thompson,* 390 U.S. 727, 734, "The public official should be subject to severe scrutiny and to free and open criticism." However, he went on to add, "The First Amendment is not a shelter for the character assassinator." If the public figure "is needlessly, heedlessly, falsely accused", he should have a remedy at law. As Mr. Justice Frankfurter pointed out, concurring in *Pennekamp v. Florida,* 328 U.S. 331, 354 (1946), "freedom of the

press, however, is not an end in itself but the means to the end of a free society". He continued, "a free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise" *Id.* at 355. "No institution in a democracy, either governmental or private can have absolute power" *Id.* . . . freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise". *Id.* at 356. Furthermore, the exercise of freedom of speech, stated Mr. Justice Frankfurter, "must be compatible with the preservation of other freedoms essential to a democracy". Unquestionably, the motivating philosophy of *New York Times v. Sullian* was that a pall of fear and timidity might be imposed upon those who would give voice to public criticism should they be silenced by fear of retribution in the form of libel suits for great sums of damage. It is equally clear that the decision calls for a high degree of self-restraint and responsibility on the part of the press as the price for the immunity granted by this court. For, if that responsibility is desregarded, then the balance between the right of an individual to be free of degradation as against the freedom of the press from the constraints of libel is unjustly weighted against the individual.

To those of us who are not intimately involved in scientific research, strife over the methodology of counting bird life may not seem like a matter of great urgency. However, to distinguished biologists such as plaintiffs, who have dedicated their professional careers to science, their reputations and integrity are their most precious assets. This is especially true in an age when ecology (among other public issues) has become a battleground for ideological warfare. The internecine struggle over the appropriate solutions and the formation of a rational public policy with respect to such issues as pollution, pesticides and atomic energy have inevitably created a need for an enlightened public which has access to the relevant information on these issues. The responsibility of the media has grown accordingly, since the peoples' right to know depends in turn upon the integrity of the press. They (the press) are the purveyors of information to a mass audience. To allow the media to engage in reckless distortion and malicious accusations against either

side of an ecological controversy (and its protagonists) is to deprive the public of its right to know. Although the New York Times may lend its vast resources today to one protagonist in an ecological controversy, tomorrow another newspaper, taking comfort from the Court of Appeals decision herein, may launch an attack on a proponent of a minority point of view who challenges an established position.

It is often asserted, to the point of ritual, that libel suits against the press have a "chilling effect" on vigorous debate, and thus an intimidated press deprives the public of vital information necessary to an informed electorate. However, the significant question arises as to who is being "chilled", the journalists or those who stake their professional reputation on entering the arena of critical public issues. It may well be that scientists will become more and more reluctant to engage in public debate when they are potentially subject to calumny and humiliation. If this turns out to be the case, it will become increasingly difficult to justify the philosophy of *New York Times v. Sullivan* in terms of the "peoples' right to know". We submit that articles similar to Mr. Devlin's piece in the New York Times are calculated to generate more heat than light on issues of vital importance to the American public, and the deprivation to the public of intelligent debate by concerned scientists may be the result more of media irresponsibility than the alleged chilling effects of potential actions for libel.

It is significant to note that the New York Times article presents to the public only one side of an environmental issue. The other side is damned *ad hominem* as being "paid to lie". There is a complete failure by Devlin to give the public even a glimpse of the scientific data he had received from the plaintiffs, or the caution they had urged upon him. This scarcely serves the purpose of enlightening the public or insuring "their right to know".

In short, Judge Kaufman's opinion for the Second Circuit Court of Appeals will inevitably result in the total emasculation of the law of defamation. As Professor Philip B. Kurland, of the University of Chicago Law School, suggests in *Politics, the*

Constitution and the Warren Court, (p. 64) the result of the *New York Times* case "has been the nationalization of the law of defamation, if not its destruction. The ultimate effect remains to be seen. But it must be apparent that what it means is a greater protection for the defamer and a diminution of the very small protection that was available to the defamed. Whether in this age of media control of the American mind this consequence should be regarded as wholesome is. . . dubious to me. . . The press has had few restraints imposed on its capacity to degrade individuals. As with other institutions, self-restraint has not provided enough restraint. One wonders whether the wisdom that came too late to Thomas Jefferson will not also come too late to us."

III. THE SECOND CIRCUIT COURT OF APPEALS OPINION VIOLATES BASIC CANONS OF APPELLATE REVIEW OF JURY VERDICTS AND SPECIFICALLY, THE RULE OF "RECORD EXAMINATION" TO DETERMINE WHETHER THE EVIDENCE IN LIBEL CASES CAN CONSTITUTIONALLY SUPPORT A JUDGMENT.

The District Court, in an opinion dismissing the New York Times motion for Judgment Notwithstanding the Verdict, stated in reference to Devlin, the New York Times reporter, "We have here a reporter of 25 years' experience who must have known from the outset that he was dealing with a libelous article. The reporter attended annual meetings of the Society, went on field trips, and had written several articles for the Society. He was not a novice as to the background of the story. Finally, his memory on the witness stand as to the events leading up to the publication of the story was abysmally poor and contradictory. He could not remember with any degree of accuracy to whom he spoke or the extent of the conversations". (26A)

"Devlin, with the names in hand, contacted Dr. WhiteStevens on August 4 and read the Foreword to him. They had a 45-minute telephone conversation which covered the whole

range of the agricultural chemical business. The testimony shows that this plaintiff was an outstanding scholar in the field of biology. Devlin was told that the statements were slanderous and scurrilous and should be checked carefully before being used." (27A)

Judge Metzner found that "the jury was justified in finding clear and convincing proof from the evidence and the inferences to be drawn therefrom that the story of August 14 was published with reckless disregard of whether it was false or not." (29A)

In light of the above evidence of record, it is little short of astonishing to find the Circuit Court of Appeals on review holding that "the evidence adduced at trial was manifestly insufficient to demonstrate 'actual malice' on the part of the New York Times," unless Judge Kaufman is using the term 'actual malice' in a Pickwickian sense unknown to conventional lawyers. Furthermore, it flies in the face of the record to assert that there was not "a shred of evidence from which the jury might have found that Devlin entertained serious doubts concerning the truth of Arbib's charge that the appellees were 'paid liars' ". (14A) We might accept with equanimity the upset of a jury verdict had the Appellate Court indicated that "there was a conflict of evidence"—but "not a shred of evidence" strains one's credulity in light of the weight of uncontradicted testimony before the jury. Moreover, contrary to the Circuit Court's characterization of petitioners' position, as we understand it, they do not assert "that once Devlin heard the scientists' denials and received materials explaining their general stand in the DDT controversy, he became charged with the duty to publish absolutely nothing until he conducted a full-scale investigation plumbing to the bottom of the matter". (15A) What they do assert is that Devlin knew from the outset that he was dealing with a potentially libelous article when he sought to transmute the generalized accusations in the Audubon Foreword into an indictment of named individuals and then threw them into the glaring spotlight of a major newspaper. Devlin did not have to "plumb" to the bottom of anything, except possibly his own conscience, because he was not interested in "plumbing" the merits of the controversy and enlightening the public about an environmental issue, as such. He was after a

sensational exposé and no warning would impede his recklessness once he had started down the path of destroying reputations.

Petitioners maintain correctly, as did the trial court, that there was just no basis for calling the plaintiffs "paid liars". In order to be paid, they would have had to be working for the industry which was presumably hiring their opinion; and hired guns they were not (although this is what the times story implied), since there is not any evidence whatsoever to show that any of these scientists was employed by or receiving money from the pesticide industry, and Devlin was fully aware of that before he published his character assassination.

We submit that the evidence of record could be, and indeed was found by the jury sufficient to warn Devlin of probable falsity. Moreover, the dictum of the Circuit Court to the effect that "the appellees would punish the Times for its effort to confirm the story" can charitably be called disingenuous. Devlin is not being condemned for looking, but for closing his eyes to what he saw. We concur in the conclusion of Petitioners' brief that the Appellate Court usurped the essential jury function of making a factual determination on the issue of actual malice and disregarded critical elements of the record evidence. The outer limits of appellate review of jury verdicts have been clearly exceeded by the Circuit Court of Appeals in this case, as Petitioners point out.

Finally, it is worth recalling again the underlying motif of *New York Times v. Sullivan*, which is that libel actions by public officials against critics of their conduct will restrain the press from freedom of expression so that public opinion will be unenlightened on critical issues. Surely, it is the consequences which flow from restraints on freedom of the press which are at stake in a democratic society. As Mr. Justice Felix Frankfurter indicated, "Freedom of the press is not an end in itself, but the means to an end in a free society". Indeed, we heartily concur in the opening paragraph of Judge Kaufman's opinion "that a democracy cannot long survive unless the people are provided the information needed to form (intelligent) judgments" on critical issues.

The case herein is a paradigm of the conflicts which arise in a modern industrial society over highly complex and technological issues such as, inter alia, environmental protection and the generation of electricity through nuclear fission plants; and even more esoteric to the layman, the safety of breeder reactor plants. Thus, noted scientists disagree on such vital factors as the safety and technical efficiency of nuclear energy. It is inevitable, therefore, that the public will seek to place its confidence in those scientists whom it can trust and upon whose reputation it can rely.

Consequently, the preservation of a scientist's reputation for integrity has become as vital a value in contemporary society as other values we cherish, including freedom of expression. Tragically, values often come into conflict, such as the conflict between freedom of speech and the right to a fair trial. The resolution of such conflicts lies at the heart of constitutional law, so that it becomes imperative to determine the extent to which the value of freedom of the press is diminished by a recognition of competing values. If we may repeat Professor Kurland's observation, "the press has had few restraints imposed on its capacity to degrade individuals". The ambit of freedom allowed to the press by *New York Times v. Sullivan* affords a scope for the exercise of its powers up to the very limit of sheer irresponsibility and recklessness. Beyond that point, freedom turns into license and the goal of "the widest possible dissemination of information from diverse and antagonistic sources", *New York Times v. Sullivan, supra* at 266, become defeated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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